

FEDERAL CIRCUIT COURT OF AUSTRALIA

ISLAM SWAPON v MINISTER FOR IMMIGRATION & ANOR [2015] FCCA 1976

Catchwords:

MIGRATION – Student visa – refusal – review of Migration Review Tribunal (“Tribunal”) decision.

ADMINISTRATIVE LAW – Allegation that the Tribunal’s decision affected by jurisdictional error by reason that it reached a wrong conclusion.

Legislation:

Migration Act 1958, ss.97, 338, 474, 476

Migration Regulations 1994, cl.573.224 of sch2, cl.4020 of sch.4

Cases cited:

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

Applicant:	G M ASRAFUL ISLAM SWAPON
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 3056 of 2013
Judgment of:	Judge Cameron
Hearing date:	3 July 2015
Date of Last Submission:	3 July 2015
Delivered at:	Sydney
Delivered on:	3 July 2015

REPRESENTATION

The Applicant appeared in person

Solicitors for the Respondents: Ms M. Stone of DLA Piper Australia

ORDERS

- (1) The application be dismissed.
- (2) The applicant pay the first respondent's costs fixed in the amount of \$4,500.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 3056 of 2013

G M ASRAFUL ISLAM SWAPON

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant, who is a citizen of Bangladesh, applied for a Student (Temporary) (Class TU) visa on 8 March 2012. On 15 November 2012 a delegate of the first respondent (“Minister”) refused the applicant’s application on the basis that he did not satisfy Public Interest Criterion 4020 (“PIC 4020”) of sch.4 of the *Migration Regulations 1994* (“Regulations”). The applicant then applied to the second respondent (“Tribunal”) for a review of that departmental decision. He was unsuccessful before the Tribunal and has applied to this Court for judicial review of the Tribunal’s decision.

2. In these judicial review proceedings the Court cannot rehear the applicant's application for a visa. Its task is to determine whether the Tribunal's decision is affected by jurisdictional error as that is the only basis upon which it can be set aside: s.474 of the *Migration Act 1958* ("Act"); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
3. For the reasons which follow, the application will be dismissed.

Relevant law

4. The criteria for the grant of a subclass 573 visa are set out in pt.573 of sch.2 to the Regulations. One of the criteria which the applicant had to satisfy at the time a decision was made on his application was cl.573.224 which relevantly required him to satisfy PIC 4020.
5. At the time the delegate and Tribunal made their decisions, PIC 4020 relevantly provided:

(1) *There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:*

(a) *the application for the visa; ...*

...

(4) *The Minister may waive the requirements of any or all of paragraphs (1) (a) or (b) and subclause (2) if satisfied that:*

(a) *compelling circumstances that affect the interests of Australia; or*

(b) *compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;*

justify the granting of the visa.

(5) *In this clause:*

information that is false or misleading in a material particular means information that is:

- (a) *false or misleading at the time it is given; and*
 - (b) *relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.*
- 6. At the time the delegate and Tribunal made their decisions, the term “bogus document” was defined in s.97 of the Act as:
 - ... a document that the Minister reasonably suspects is a document that:*
 - (a) *purports to have been, but was not, issued in respect of the person; or*
 - (b) *is counterfeit or has been altered by a person who does not have authority to do so; or*
 - (c) *was obtained because of a false or misleading statement, whether or not made knowingly.*

Background facts

Visa application

- 7. As noted earlier, the applicant lodged his application on 8 March 2012. On 12 March 2012 an officer in the Minister’s department (“Department”) wrote to him relevantly requesting that he provide evidence that he had sufficient funds to pay for his course fees. On 5 April 2012 the applicant wrote to the Department stating that his father was his sponsor and had 3,430,536 Bangladeshi taka, (AU\$41,835.81) in an account with the Pubali Bank in Bangladesh. The applicant attached a bank statement from the Pubali Bank for the period 2 October 2011 to 28 March 2012 which showed a closing balance of 3,591,977.12 Bangladeshi taka for an account in his father’s name.
- 8. On 10 April 2012 the Department referred the bank statement submitted by the applicant for verification and on 18 April 2012 the Pubali Bank advised that the document did not exist in its records. On 23 April 2012 the applicant was invited by the Department to comment on that information. In response, the applicant provided new evidence of his father’s capacity to support him in the form of a student loan

from the Brac Bank in Bangladesh but did not address the information put to him by the Department.

9. The delegate refused to grant the applicant a visa because she found that he had provided a fraudulent document to the Department in relation to his student visa application and he therefore did not meet PIC 4020 and in turn the requirements of cl.573.224 of sch.2 to the Regulations.

Tribunal proceeding

10. On 11 October 2013 the applicant appeared before the Tribunal and stated that although by then he knew that the bank statement from the Pubali Bank was not genuine, at the time he submitted it he had not known. He stated that, at the time, his father had been unwell and had not had enough money in the bank so his brother had organised the bank documents. He said that he should have double-checked with his father before he lodged them but had not. In relation to circumstances which might lead to the waiver of PIC 4020(1), the applicant stated that he attended the mosque and did religious work. He said that he helped people who might be Australian citizens or permanent residents to cross the road. The applicant provided three references attesting to his good character. He also stated that he had commenced a Bachelor of Professional Accounting which he was due to finish on 31 December 2013.

The Tribunal's decision and reasons

11. The Tribunal affirmed the delegate's decision to not grant the applicant a Student (Temporary) (Class TU) visa.
12. In reaching its decision, the Tribunal noted that the applicant had admitted that he had provided a false bank document with his visa application. It found that the bank statement submitted by the applicant met the definition of "bogus document" because it purported to have been, but was not, issued in respect of a person by the Pubali Bank. It therefore concluded that the applicant did not meet PIC 4020(1) as there was evidence before it that he had given, or caused to be given, to it a bogus document in relation to his visa application.

13. The Tribunal went on to consider whether there were compassionate or compelling circumstances to justify the waiver of the requirements of PIC 4020(1) and concluded that there were not. In that regard:
- a) while accepting that the applicant's brother was responsible for the bogus bank statement, the Tribunal did not accept that that fact and the fact that the applicant had almost completed his studies were compelling circumstances which affected the interests of Australia; and
 - b) the Tribunal noted that the applicant had provided a number of references as to his good character, which the Tribunal accepted as genuine. It also noted his evidence about how he had helped the community. However, it found that while the applicant might be of good character and might have provided some personal assistance to Australian citizens or permanent residents or eligible New Zealand citizens, it could not characterise that assistance as amounting to compassionate or compelling circumstances affecting those people's interests.

Proceedings in this Court

14. In the application commencing these proceedings the applicant alleged:
1. *The delegate to the Minister (DIBP) failed to understand that I am a genuine student as a student visa holder.*
 2. *The delegate to the Minister (DIBP) failed to justify that I have access to the funds declared according with the clause 573.224 in schedule 2 of the Migration Regulation.*
 3. *The delegate to the Minister failed to understand that I have access to the fund according to the PIC 4020.*
15. All of the grounds pleaded in the application are addressed to errors which the delegate is said to have made. However, the delegate's decision is not an MRT-reviewable decision under s.338 of the Act and so by virtue of s.476 of the Act the Court has no jurisdiction in respect of it. For that reason alone, the application should be dismissed.
16. However, even if those allegations had been directed to the Tribunal they would still not have disclosed a basis on which the Tribunal's

decision should be set aside because they did not address the basis of the Tribunal's decision, namely, that a bogus document had been supplied in support of the applicant's application for a visa. That conduct disentitled the applicant to a visa unless relevant compassionate or compelling circumstances existed but the Tribunal found that none did. The applicant did not seek to demonstrate error in that latter aspect of the Tribunal's decision.

17. The applicant also filed written submissions which argued that his father had always had funds sufficient to satisfy the relevant financial criterion for the grant of the visa he sought and that for various reasons his brother had taken it upon himself to send him a document which was bogus.
18. The applicant directed the Court's attention to documents which he supplied subsequent to the provision of the documents which the Tribunal found were bogus. Those documents are said to accurately and truthfully set out the bank balances of the applicant's father. However, by the time the applicant supplied those documents, the question was no longer whether his access to finance was sufficient but whether a bogus document had been supplied. Once it had been determined that a bogus document had been supplied, the later-supplied documents were of no material relevance and so the fact that the Tribunal did not base its decision on them was not erroneous.

Conclusion

19. Jurisdictional error on the part of the Tribunal has not been demonstrated.
20. Consequently, the application will be dismissed.

I certify that the preceding twenty (20) paragraphs are a true copy of the reasons for judgment of Judge Cameron

Associate:

Date: 22 July 2015